FILED
JUL 24 195
JOHN T. FEY, C

No. 206.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

JOHN H. LEONARD,

Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

C. WILLIAM O'NEILL,
Attorney General,
WILLIAM E. HESSON,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Stanley J. Bowers, Tax Commissioner.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., COLUMBUS 15, OHIO

INDEX.

Opinion below 2
Statutes involved 2
Statement of the case..... 6
Argument 7
I. The Ohio use tax does not violate Article I, Sections 10 and 8, nor Section 1 of the Fourteenth Amendment to the Constitution of the United States..... 7
II. The second question raised by the petitioner was not necessarily involved in the decision of the Ohio Supreme Court 9
Conclusion 10

Cases Cited.

Curry v. McCanless, 307 U. S., 357, 83 L. Ed., 1339.... 7

Felt & Tarrant Manufacturing Co. v. Gallagher, 306 U. S., 62, 83 L. Ed., 488..... 7

Henneford v. Silas Mason Co., 300 U. S., 577, 57 S. Ct., 524, 81 L. Ed., 814.....7, 8, 9

Minnesota v. Blasius, 290 U. S., 1, 54 S. Ct., 78 L. Ed., 131 7

Southern Pacific Co. v. Gallagher, 306 U. S., 167, 59 S. Ct., 389, 83 L. Ed., 586..... 7, 8

Statutes Cited.

Revised Code of Ohio—
Section 4505.06 ..... 2, 10
Section 5739.02 ..... 3, 7
Section 5741.02 3
Constitution of the United States, Section 1, Fourteenth Amendment 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 206

JOHN H. LEONARD,

Petitioner,

vs.

STANLEY J. BOWERS, TAX COMMISSIONER OF OHIO,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI.

The respondent in the above entitled cause, for his brief in opposition to the petition for certiorari to the Supreme Court of Ohio, respectfully states the following:

OPINION BELOW.

The Supreme Court of Ohio on February 15, 1956, dismissed the petitioner's appeal as of right for the reason that no debatable constitutional question was involved, 164 Ohio St., 578, and on the same date overruled the petitioner's motion to certify the record.

STATUTES INVOLVED.

Section 4505.06, Revised Code of Ohio:

> "Application for a certificate of title shall be made upon a form prescribed by section 4505.07 of the Revised Code, and shall be sworn to before a notary public or other officer empowered to administer oaths. Such application shall be filed with the clerk of the court of common pleas of the county in which the applicant resides if the applicant is a resident of this state or, if not a resident, in the county in which the transaction is consummated. * * *
>
> "The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless prepaid tax receipts required by section 5739.03 of the Revised Code are presented with the application in the manner and form to be prescribed by the tax commissioner or unless the applicant submits with the application, payment of such tax by cash, certified check, draft, or money order payable to the clerk who shall issue a receipt in the form prescribed by the commissioner, or a receipt issued by the commissioner showing the payment of the tax. * * *

"* * * When the transfer to the applicant was made in some other state or in interstate commerce, the clerk, except as provided in this section, shall refuse to issue any certificate of title unless the tax imposed by section 5741.02 of the Revised Code has been paid as evidenced by a receipt issued by the commissioner, or unless the applicant submits with the application, payment of such tax by cash, certified check, draft, or money order payable to the clerk. * * *"

Section 5739.02, Revised Code of Ohio:

"* * * an excise tax is hereby levied on each retail sale made in this state of tangible personal property.

"(A) The tax is as follows:

"(1) No tax is imposed if the price is less than forty-one cents;

"(2) Two cents, if the price is more than forty but not more than seventy cents;

"(3) Three cents, if the price is more than seventy cents but not more than one dollar;

"(4) If the price is in excess of one dollar, three cents on each full dollar and in addition, one cent if the price exceeds an even number of dollars by more than eight but not more than forty cents; two cents if such excess is more than forty but not more than seventy cents; and three cents if such excess is over seventy cents.

"The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

Section 5741.02, Revised Code of Ohio:

"(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use,

or other consumption in this state of tangible personal property purchased for storage, use, or other consumption in this state, as follows:

"(1) No tax, if the price for which such property has been purchased is less than forty-one cents;

"(2) Two cents, if such price is more than forty cents and not more than seventy cents;

"(3) Three cents, if such price is more than seventy cents and not more than one dollar;

"(4) If such price is in excess of one dollar, three cents on each full dollar thereof; and if such price is not an even number of dollars, then, in addition to said tax on each full dollar, one cent, if such price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents, if such excess is more than forty cents and not more than seventy cents; and three cents, if such excess is over seventy cents.

"(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property purchased for such purpose, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided that a prepaid tax receipt, given to the consumer in accordance with section 5741.04 of the Revised Code, or the prepayment of the tax in accordance with section 5741.06 of the Revised Code shall relieve the consumer from further liablity for the tax to which such receipt refers.

"(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property, nor to the storage, use, or consumption in this state of tangible personal property

purchased under the following described circumstances:

"(1) When the sale of property in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31, inclusive, of the Revised Code, and when said excise tax is expressly made inapplicable to the sale of property in this state by divisions (B) (1), (B) (2), (B) (4), (B) (6), (B) (7), (B) (8), (B) (9), (B) (13), (B) (14), and (B) (15) of section 5739.02 of the Revised Code;

"(2) When the tangible personal property is purchased for a use which would exempt the sale of such tangible personal property from the tax imposed by section 5739.02 of the Revised Code;

"(3) Property, the storage, use, or other consumption of which this state is prohibited from taxing by the constitution of the United States, laws of the United States, or the constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property which was purchased in interstate commerce, but which has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce which is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

STATEMENT OF THE CASE.

The facts in this matter were stipulated and said stipulation is contained in the certified transcript of the record filed by the petitioner.

The petitioner, an Ohio resident, purchased a car in Florida for use in Ohio. On his return to Ohio he was refused an Ohio certificate of title until the use tax had been paid. The petitioner paid the use tax and applied for a refund of the tax so paid with the Ohio Tax Commissioner.

Said claim was denied by the Tax Commissioner and the petitioner appealed to the Ohio Board of Tax Appeals. The board affirmed the order of the commissioner and the petitioner appealed to the Court of Appeals for the Ninth Appellate District. The Court of Appeals affirmed the decision of the Board of Tax Appeals.

From this action the petitioner filed in the Supreme Court of Ohio an appeal as of right, together with a motion to certify. The appeal was dismissed February 15, 1956, 164 Ohio St., 578, and the motion to certify denied.

The petitioner now seeks to invoke the jurisdiction of this court contending that the Ohio use tax on the storage, use or other consumption in this state, violates Article I, Sections 10 and 8, of the Constitution of the United States and deprives him of equal protection of the laws and takes his property without due process of the law in violation of Section I of the Fourteenth Amendment to the United States Constitution.

ARGUMENT.

I.

The Ohio Use Tax Does Not Violate Article I, Sections 10 and 8, nor Section 1 of the Fourteenth Amendment to the Constitution of the United States.

The petitioner contends that the Ohio use tax is discriminatory in operation as it does not apply to persons making purchases in Ohio. Ohio purchasers of tangible personal property are, however, subject to a sales tax imposed at the same rate as the use tax. Section 5739.02, Revised Code of Ohio, supra. The question presented by the petitioner is not one of first impression, having been passed on upon other occasions by this court.

Taxes upon the privilege of use, storage or other consumption within a state do not impose an unconstitutional burden on interstate commerce. *Henneford* v. *Silas Mason Co.*, 300 U.S., 577, 57 S.Ct., 524, 81 L.Ed., 814; *Southern Pacific Co.* v. *Gallagher*, 306 U.S., 167, 59 S.Ct., 389, 83 L.Ed., 586; *Felt & Tarrant Manufacturing Co.* v. *Gallagher*, 306 U.S., 62, 83 L.Ed., 488.

The Ohio use tax is not a tax upon the operations of interstate commerce but on the privilege of use, storage or other consumption in this state after the commerce is at end. Every state by the virtue of its sovereignty has power to tax privileges exercised within its boundaries. *Curry* v. *McCanless*, 307 U.S., 357, 83 L. Ed., 1339. Once property is outside the stream of commerce and inside the confines of the state, it is subject to tax either on some or all of its attributes of ownership. *Minnesota* v. *Blasius*, 290 U.S., 1, 54 S.Ct., 34, 78 L.Ed., 131.

The petitioner recognizes the existence of the case of *Henneford* v. *Silas Mason Co.*, supra, although he expresses some doubts concerning the soundness of the decision. In *Henneford* v. *Silas Mason Co.*, supra, Justice Cardoza explains the nature of the use tax on pages 582 and 583 of the opinion:

> "Things acquired or transported in interstate commerce may be subjected to a property tax, non-discriminatory in its operation, when they have become part of the common mass of property within the state of destination. * * * For like reasons they may be subjected, when once they are at rest, to a non-discriminatory tax upon use or enjoyment. * * * The privilege of use is only one attribute, among many, of the bundle of privileges that make up property or ownership. * * * A state is at liberty, if it pleases, to tax them all collectively, or to separate the faggots and lay the charge distributively. * * * *A tax upon the privilege of use or storage when the chattel used or stored has ceased to be in transit is now an impost so common that its validity has been withdrawn from the arena of debate.* * * *" (Emphasis added.)

The petitioner seems to believe that by levying both a sales and use tax on tangible personal property purchased and used in Ohio while at the same time levying only a use tax on tangible personal property purchased outside Ohio for use in Ohio, a kind of tax balance would be effected. There is no evidence in this matter that the petitioner has paid any sales tax in the state of purchase. Since the petitioner did not show or allege a tax paid in a foreign state, the question of discrimination is not present. *Southern Pacific Co.* v. *Gallagher*, 306 U.S., 167, 172.

That a state is not required to tax every incident of ownership alike to have equality is shown by the foregoing discussion. The exemption from the use tax of tangible personal property on which the Ohio sales tax has been

paid does not violate Section I of the Fourteenth Amendment to the Constitution of the United States. A taxing act is not invalid because the exemptions allowed are greater than the Legislature need make them. *Henneford v. Silas Mason Co.*, 300 U.S., 577, 587.

The petitioner has been subjected to no greater burden as a consequence of ownership because of his purchase outside Ohio than a person purchasing inside Ohio. The petitioner has not been deprived of equal protection of the laws nor his property been taken without due process of law.

II.

The Second Question Raised by the Petitioner Was Not Necessarily Involved in the Decision of the Ohio Supreme Court.

The petitioner complains that the manner of collection of the use tax deprived him of his property without due process of law, deprives him of equal protection of the laws, and amounts to duress.

It is the opinion of the respondent that the action of the clerk of courts is not in issue. The petitioner chose to contest this matter by seeking a refund of the use tax paid, rather than by mandamus of the clerk of courts.

The only issue before the Ohio courts was whether there had been an illegal or erroneous payment of the use tax. The fact that the tax was paid prior to review does not deprive petitioner of due process, as on the refund application he has the right of review not only by the taxing authority but by the Board of Tax Appeals and the courts of this state.

Further, the action of the clerk applies to title to motor vehicles purchased in Ohio as well as outside this state so that there is no discrimination or denial of equal protection. See Section 4505.06, Revised Code of Ohio, supra.

CONCLUSION.

It is submitted that the decision of the Supreme Court of Ohio is in accordance with prior decisions of this court and the questions that are properly presented by the petition do not present new matter and do not raise a debatable constitutional question.

Wherefore, respondent prays that the writ of certiorari be denied.

Respectfully submitted,

C. William O'Neill,
Attorney General,
William E. Herron,
Assistant Attorney General,
State House, Columbus 15, Ohio,
Attorneys for Stanley J. Bowers, Tax Commissioner.